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DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0410

This Decision concerns the eligibility of xxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

On May 12, 2006, the DOE issued a notification letter to the individual. Attached to the notification letter was a statement entitled "Information creating a substantial doubt regarding eligibility for an Access Authorization" (hereinafter referred to as the "information statement"). The information statement indicates that the individual was arrested for Driving Under the Influence of alcohol (DUI) on August 31, 1996. After that arrest, he stopped consuming alcohol until December 2000. Information Statement B. 2. On April 11, 2003 the individual was again arrested for DUI. His breath alcohol concentration (BAC) was .012. Following the second arrest, the individual was evaluated by a DOE consulting psychiatrist. The evaluations took place on December 13, 2003 and again on January 13, 2006. In his evaluation report following the January 13 evaluation the DOE consulting psychiatrist diagnosed the individual with alcohol abuse.

The notification letter finds that the alcohol incidents and the diagnosis of alcohol abuse by a DOE consulting psychiatrist create a security concern under Criterion J. 10 C.F.R. §710.8(j).

The notification letter informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (the hearing).

At the hearing the individual was represented by counsel. In his opening statement, the counsel indicated he would present testimony to demonstrate that the individual has been, with one exception, abstinent since

July 2005. He also indicated he would present the testimony of a psychiatrist who evaluated the individual prior to the hearing (hereinafter the “individual’s psychiatrist”). Transcript of Hearing (Tr.) at 7. At the hearing, the DOE presented the testimony of the DOE consulting psychiatrist. Below is a summary of the testimony at the hearing.

II. HEARING

A. The Individual

The individual testified that after his April 2003 DUI arrest, he ceased consumption of alcohol for approximately eight months. Tr. at 86. In January 2004, he decided that he could resume moderate consumption of alcohol. On September 14, 2005, the individual had a Personnel Security Interview (PSI). DOE Exhibit #10. The individual testified that the security specialist who conducted the PSI asked him many questions about his decision to resume consuming alcohol. Based upon those questions the individual came to the conclusion that the DOE “thinks I can’t quit.” Toward the end of the PSI the individual made a commitment to the security specialist that he would cease the consumption of alcohol (hereinafter “the 2005 verbal commitment to cease consumption of alcohol”). Tr. at 71.

The individual testified that as a result of the insight he gained during the September 2005 PSI and his commitment to the security specialist, he did stop consuming alcohol. However, at that time he did not discuss with his wife his decision to stop consuming alcohol. Tr. at 84. On December 28, 2005 he and his wife were observing their wedding anniversary. Their son had sent his mother a special bottle of wine to help them celebrate. Tr. at 72. On December 28 his wife opened that bottle of wine and made persistent requests that her husband join her in toasting their anniversary with a glass of wine. Tr. at 72. The individual testified that after first refusing the wine he consumed a single glass of wine. After he consumed that glass he told his wife about the PSI, his understanding of the DOE concern relating to his use of alcohol, and his promise to the security specialist that he would not consume alcohol. He believes that his wife now understands and supports his decision not to consume alcohol. The individual testified that he has not consumed any alcohol since December 28. Tr. at 73. He indicated with the exception of the single glass of wine with his wife, he has not consumed any alcohol and he has had no difficulty turning down suggestions that he consume alcohol. Tr. at 79 and 82.

The individual testified that his resolve to maintain his abstinence became stronger when he received the May 12, 2006 notification letter. In his June 7, 2006 written response to the notification letter the individual wrote “I swear . . . to you I will never drink alcohol again.” DOE Exhibit #4. Hereinafter “the June 2006 written commitment to cease consumption of alcohol.” The individual strongly believes that his written oath is a clear indication of his resolve not to consume alcohol in the future. He testified that after he sent this letter to the DOE, he revealed to a church elder that he had taken a binding oath not to consume alcohol. Tr. at 75. He believes this oath indicates his one time consumption of alcohol on December 28 will not recur. Tr. at 77.

The individual testified that after his DUI arrests in 1996 and 2003 he made a conscious decision to stop consuming alcohol. In both cases, after a period of abstinence, he decided to resume alcohol consumption. He does not believe that he will again resume alcohol consumption because he now understands that DOE

has a serious concern related with his consuming alcohol. Tr. at 88. He testified that “what has changed is the realization that DOE wanted me to be abstinent I know it sounds simplistic, but all through those years I didn’t know that. That’s why [in the past] I returned to [consuming alcohol].” Tr. at 94. He was asked if he would resume consuming alcohol if he were no longer employed by the DOE. He testified that he would not because he has “taken an oath” and it is “not a good thing for a person that has responsibilities to drink.” Tr. at 89 and 91.

B. The Individual’s Supervisor

The individual’s supervisor testified that he has worked with and supervised the individual for 10 years at the DOE site. Tr. at 9. He testified that the individual understands the nature of the work, is punctual and does a very good job. He has never had a problem with the individual. Tr. at 10.

C. The Individual’s Co-worker

This witness testified that he has known the individual casually for 12 years. He indicated that since the individual was laid off at the site they have worked together doing skilled manual labor. Tr. at 14. He believes the individual is a reliable worker and he considers him to be a good friend. Tr. at 16.

The co-worker testified that at the end of their work day he brings out his cooler from his truck and has a beer. He has offered the individual a beer on several occasions. However, the individual has made it clear that he does not consume alcohol. Tr. at 16. He does not believe the individual has a problem with alcohol. Tr. at 17.

D. The Church Elder

The church elder has been a friend of the individual and his family for 30 years. Tr. at 21. The elder is a close neighbor and they have attended the same church for 30 years. Tr. at 22. He normally sees the individual twice a week. He has never seen the individual consume alcohol to excess. He testified that after the individual’s 2003 DUI, the individual came to him as a church elder and explained that he had been cited for DUI. At that time, he was seeking spiritual-personal guidance about alcohol use. Tr. at 33. After their discussion, he concluded that the DUI was a one-time incident and that it was “not an ongoing problem.” Tr. at 34. However, he testified that he recommended that the individual stop consuming alcohol. Tr. at 36. Finally, the church elder testified that he is not aware of any alcohol use by the individual in the last year. Tr. at 36. He believes that the individual is currently committed to abstinence. Tr. at 36.

E. The Individual’s Wife

The individual’s wife testified that she and the individual have six children and have been married for 31 years. Tr. at 39. She testified that the individual’s alcohol consumption has never created any specific or unusual problems in their family. However, she recalled that in 2004 the individual consumed alcohol on a daily basis and she was somewhat concerned that if he continued that alcohol consumption pattern he might become dependent on alcohol. Tr. at 40.

The individual's wife further testified that since September 2005 the individual consumed alcohol on only one occasion. That occasion was the December 2005 wedding anniversary discussed above. Tr. at 60. At that time, she told the individual it was a special occasion and she convinced him to have a glass of wine. Tr. at 51. After drinking the glass of wine, the individual told her, for the first time, about his September 2005 "verbal commitment to cease consumption of alcohol." Tr. at 60. She testified that the individual told her that "it would probably [have been] better if he didn't drink." Tr. at 41. She testified that he has not consumed any alcohol since that evening. She gave as an example a 2006 super bowl party. There was alcohol available at the party but the individual declined invitations to consume alcohol. Tr. at 43.

The individual's wife indicated that the individual has on several occasions stopped consuming alcohol for significant periods of time. On those occasions after a period of abstinence the individual resumed consuming alcohol. However, this is the first time that the individual has "verbally committed himself to cease the consumption of alcohol." Tr. at 53. She believes, notwithstanding the glass of wine in December 2005, the individual will fulfill his "verbal commitment not to consume alcohol." Tr. at 54.

F. The Individual's Son

The individual's son, who is 26 years old, testified that he was twenty when he moved from his parents' home and that he lived near to his parents until he was 22. Tr. at 63. In the last four years he sees his parents on a monthly basis. Tr. at 64. He testified that when he was living at home his father would have a drink or two but he never drank to excess. Tr. at 68.

He testified that at the 2006 super bowl party when he offered his father some alcohol, his father was "adamant on not having anything." Tr. at 64. He also testified that during a visit to his parents' home in the fall of 2005 he had offered his father some beer but "he would not drink anything then either." Tr. at 65. He testified that he has not seen his father consume any alcohol in the last year and his father has told him that "he's never going to drink again." Tr. at 66. He believes once his father makes a commitment he will follow through. Tr. at 67.

G. The Individual's Psychiatrist

The individual's psychiatrist testified that he evaluated the individual on August 11, 2006. Tr. at 103. During that evaluation, he diagnosed the individual with alcohol abuse in full remission. Tr. at 105. He testified that the individual "... has reached an awareness that ... the use of alcohol is not in his own personal best interest, not just a matter of it's not in his employer's best interest, but in his own personal his own life and well-being." Tr. at 112.

The individual's psychiatrist testified that his professional opinion is that there is less than a 30% chance the individual will drink to excess in the next five years. He testified that

I think he now realizes for himself and his own health and well-being as well as separately for his employment, I think he now has a family that understands and supports his abstinence. I think he has made an open commitment to his church and his religion.

Tr. at 118.

The individual's psychiatrist believes that the individual's current period of sobriety will end differently from his earlier periods of sobriety. In this regard he testified:

I think that at that time [1996 and 2003] he was still rationalizing and denying the fact that he was drinking too much and that for him he should drink none. And I think it was part of the evolution of his awareness that had not yet come to the tipping point. I think that later on we got to a tipping point where he finally could say . . . I've got to stop for me and my health, et cetera, as well as for my employment.

Tr. at 129.

F. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist testified by telephone. He confirmed that his January 13, 2006 report diagnosed the individual with alcohol abuse. Tr. at 137. He stated that since the individual was arrested for DUI in April 2003, there has not been a five year period "where [the individual] was abstinent or drinking under control." He concluded

So he has not reached the 50% point. In addition, we note that in [early] 2005 he's still drinking a lot of whiskey, although he hasn't gotten in trouble because of it. So these things indicate to me that more likely than not he may again run into trouble.

Tr. at 138.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

As is evident from the description of the testimony at the hearing, both psychiatrists diagnosed the individual with alcohol abuse. The question before me is whether the individual has mitigated the security concern related to that diagnosis. The testimony of the individual, his wife, his co-worker and his son convince me that the individual has, with the exception of one glass of wine on December 28, been abstinent since September 15, 2005. Their testimony also indicates that the individual has made it clear to his family and friends that he is not consuming alcohol.

The two psychiatrists did not agree on whether the abstinence period and other information presented by the individual mitigate the DOE security concern. The DOE consulting psychiatrist testified that to mitigate the DOE security concern the individual must demonstrate a five year period in which he has no significant problems with alcohol. In his view, this would support a 50% or less probability of relapse. Even though he was asked to consider whether he believes that the individual's recent behavior has mitigated the security concern, the DOE consulting psychiatrist was unwilling to testify directly about the individual's situation, and merely repeated his general position that a person in the individual situation must demonstrate a five year period of no alcohol problems. I found him to be unresponsive to my concerns. The DOE psychiatrist did not explain why he believes a 50% probability of relapse is the appropriate standard for me to apply in determining whether the individual has mitigated the Criterion J

security concern. Nor did he indicate why a five year period without a relapse meets his 50% probability of relapse standard. I found his testimony very unenlightening and unrealistic.

The individual's psychiatrist took a more balanced approach. He recognized that the likelihood that the individual will maintain his abstinence would be stronger if he had a better understanding of alcohol abuse and if his support system were more actively engaged in his commitment to sobriety. However, he testified that the individual is sufficiently aware of his problem and the consequences of additional consumption of alcohol for him to find that the probability that the individual will drink to excess in the next five years is less than 30%.

I do have a small lingering doubt here because my overall impression of the individual is that he does not fully understand the diagnosis of alcohol abuse and is not able to easily communicate with his family and friends regarding his alcohol use. Nevertheless, I believe the individual has clearly committed himself to abstinence, and his family and the church elder are sufficiently aware of his commitment to abstinence. I believe they will provide the support the individual needs to maintain his abstinence. Even if the individual is not sophisticated enough to understand the alcohol abuse diagnosis, I believe his current assertions that he views his commitment to the DOE to abstain from alcohol as very different from his previous decision to cease alcohol consumption. He used words such as "taken an oath." I am convinced that the individual now understands for the first time the nature of the DOE's concern regarding his use of alcohol and he is very serious about keeping his commitment to the DOE. In my opinion, these strong factors overcome my remaining doubts about whether he will maintain his abstinence. Therefore, I am convinced by the individual's psychiatrist that there is less than a 30% chance that the individual will consume alcohol to excess in the next five years. I believe that a relapse possibility of less than 30%, under the circumstances presented here, is sufficient to mitigate the concern regarding the individual's abuse use of alcohol. See Personnel Security Hearing (Case No. TSO-0320), 29 DOE ¶ 82,920 (2006). Accordingly, I am persuaded that he has mitigated to the DOE's Criterion J security concern.

V. CONCLUSION

I have concluded that the individual has mitigated the DOE security concerns under Criterion J of 10 C.F.R. § 710.8. In view of the record before me, I am persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: November 3, 2006

